

CALIFORNIA COASTAL COMMISSION

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**SENT VIA ELECTRONIC MAIL**

July 3, 2020

Lisa Mangat, California State Parks Director

Lisa.Mangat@parks.ca.gov

Liz McGuirk, California State Parks Chief Deputy Director

Liz.McGuirk@parks.ca.gov

**Re: Confirmation of Notice of Intent to Issue Executive Director Cease and Desist Order
Violation File No. V-3-20-0048 - Oceano Dunes State Vehicular Recreation Area**

Dear Meses. Mangat and McGuirk:

Thank you again for making yourselves so available over the last week to try to come to a resolution of issues that have recently arisen at the Oceano Dunes State Vehicular Recreation Area ("ODSVRA").¹ It has been an intense week of discussions, and we believe we have made a great deal of progress. Unfortunately, however, our respective agencies still have some areas of continuing disagreement, some of which present urgent issues that require immediate action. Thus, as is explained below in more detail, the purpose of this letter is to confirm my intention, as relayed to both of you during yesterday's call, to issue an Executive Director Cease and Desist Order ("EDCDO" or "Order") to State Parks. This Order will serve to protect critical coastal resources in the short term while we continue to seek longer term solutions to address Coastal Act concerns at ODSVRA. The Order can also serve to confirm those areas in which we have reached agreement, such as the cessation of "scuffing" of Western snowy plover nests, as well as provide authorization for certain actions that we agree are critical in the short term to protect coastal resources, such as the placement of appropriate enclosure fencing for plover and California least tern, when necessary.

The fundamental legal basis for this notice is that we continue to believe that a number of the activities that State Parks has been conducting, and has not agreed to cease, or that are being proposed, constitute "development," as that term is defined in the Coastal Act,² and lack the requisite Coastal Act authorization. The activities of most immediate concern include:

- Grading and operation of heavy equipment. Moving, removing and depositing large quantities of sand in and on the beach and foredunes south of Mile Post (MP) 3 though the use of heavy equipment (e.g., large bulldozers, etc.), and in the process disturbing and/or disrupting nesting plovers and the terns, changing

¹ See June 16, 2020 letter from Lisa Haage to each of you for our summary of these issues, but note that the description therein and herein is not necessarily a complete list of all unpermitted development at the ODSVRA that is in violation of the Coastal Act and/or the San Luis Obispo County Local Coastal Program. Accordingly, you should not treat the Commission's silence regarding (or failure to address) other unpermitted development at ODSVRA as indicative of Commission acceptance of, or acquiescence in, any such development.

² See Cal. Pub. Res. Code ("PRC") § 30106.

surface topography and modifying the beach's biological and geophysical processes.

- Fencing and staking. The placement of stakes, fences and "exclosures" (though we agree that some of this may not only be appropriate, but urgent, and, as such, may be authorized by the Order).
- Moving or directing birds. State Parks personnel actively attempting to move plovers that exhibit nesting behaviors outside of established exclosures, or plover broods, to locations inside of established exclosures. We understand that State Parks has been carrying out, and still intends to carry out, at least in a limited fashion, these activities despite the Park currently being closed to vehicle/OHV and camping uses.
- Planned resumption of OHV/vehicle use and camping in environmentally sensitive habitat areas (ESHA) where plover nesting activities have occurred and are still occurring this nesting season, i.e., south of MP3.

Because activities undertaken at the Park constitute development and lack authorization pursuant to the Coastal Act and/or the San Luis Obispo County Local Coastal Program (the "LCP"), they constitute violations of the Coastal Act and the LCP.³ In addition, these activities are not authorized by the base CDP that provides overall Park operation authorization (CDP 4-83-300).

Although we may agree that some of these activities may be intended, in part, to benefit the sensitive bird species, that does not change the fact that they require legal authorization. Moreover, we have not yet reached complete agreement on which activities are appropriate and consistent with the Coastal Act, nor on guidelines for conducting such activities. Further, we believe that if not conducted correctly, even well intentioned actions can cause additional coastal resource harm. It is only through the process of obtaining authorization under the Coastal Act that the Commission can fulfill its charge of ensuring that the actions taken, and the methods used, are consistent with the policies of the Coastal Act and/or the LCP. This process is specifically designed for public input, including that of other interested agencies.

Therefore, as I indicated during yesterday's call, because we have not been able to come to an agreement that State Parks will cease these unpermitted activities until appropriate authorization has been secured, I have determined that I need to exercise my authority as the Executive Director of the Commission, pursuant to PRC Section 30809, to issue an EDCDO. We continue to hope that you will agree to cease the unpermitted activities until proper authorization is in place, in which case we can structure the Order as a "Consent" EDCDO. However, if we cannot come to agreement, I plan to issue the EDCDO unilaterally. As I indicated yesterday, the Order will include a prohibition on the re-opening of the ODSVRA to camping or vehicle/OHV use south of MP 3 until the end of September (the end of nesting season), since this is the area most intensively being used by the plovers and tern this year while the Park has been closed, and thus the area with the greatest potential for impact on these nesting birds and related nesting activities.

Thus, the purpose of this EDCDO is to address the need for immediate action to protect sensitive coastal resources in the interim, but it is not intended to resolve all potential

³ Again, see the June 16, 2020 letter for details.

unpermitted activities occurring at the Park, as we have previously pointed out in our correspondence and discussions. These other activities continue to lack legal authorization and require such authorization to resolve the violations. We will continue to work with you on these issues through the context of the annual CDP review and PWP processes.

Legal Framework

PRC Section 30809(a) authorizes me to issue an EDCDO to a governmental agency that:

“has undertaken, or is threatening to undertake, any activity that (1) may require a permit from the commission without securing a permit or (2) may be inconsistent with any permit previously issued by the commission. . . . The order may be also issued to enforce any requirements of a certified local coastal program. . . .”⁴

PRC Section 30809(b) states that the order may be issued if the agency:

“has failed to respond in a satisfactory manner to an oral notice given in person or by telephone, followed by a written confirmation, or a written notice given by certified mail or hand delivered to the landowner or the person performing the activity.”

Section 13180(a) of the Commission’s regulations⁵ defines the phrase “satisfactory manner,” as that term is used in PRC section 30809(b), as being “a response that is made in the manner and within the timeframe specified in the notice and” that satisfies the standards of Sections 13180(a)(1) or (2) of the Commission’s regulations.

Therefore, to prevent the issuance of a unilateral EDCDO, you must provide a response by Noon on Monday, July 6, 2020, indicating your agreement: (1) to immediately and completely cease and desist from performing any of the activities listed in the bullet points above, unless and until authorized by a valid, effective Coastal Development Permit or CDP Amendment, or by the Commission through an order or the certification of a Public Works Plan and approval of associated Notice of Impending Development; and (2) to our memorializing that agreement through the issuance of a Consent EDCDO. Please respond via email to Pat.Veesart@coastal.ca.gov, and by phone to Alex Helperin at 415-904-5228.

The Executive Director Cease and Desist Order shall be effective upon its issuance and shall be effective for 90 days. Under the Coastal Act, the EDCDO may be subject to such terms and conditions as the Executive Director may determine are necessary to avoid irreparable injury to any area within the jurisdiction of the Commission pending action by the Commission under PRC Section 30810 (which gives the Commission itself the authority to issue a permanent Cease and Desist Orders).

Pursuant to PRC Section 30809(b)(3), I am also obligated to inform you that if the EDCDO is issued, any violation thereof may subject State Parks to additional liability under the Coastal Act in the form of fines.

⁴ This language goes on to identify three criteria, one of which must be satisfied prior to the issuance of an order that is solely enforcing the requirements of an LCP. In this case, the Order would also be enforcing a Commission permit, but the criterion in subdivision 30809(a)(2) (allowing for an order to enforce an LCP) has been satisfied in any case, as Matt Janssen, Division Manager of the San Luis Obispo County Planning Department, sent an email message to Pat Veesart reiterating that the “County of San Luis Obispo agrees that the Coastal Commission should take primary enforcement authority.”

⁵ The Commission’s regulations are codified in Title 14, Division 5.5 of the California Code of Regulations.

Conclusion

If you do confirm your agreement to cease the activities listed in the bullet points at the beginning of this letter, please also confirm in writing that State Parks will carry out the following additional commitments to which we understand you have already agreed informally, through your written proposal and in our discussions:

- Cease the placement of mylar flags or ribbons on stakes near plover nests or potential plover nesting "scrapes," or the placement of any other devices designed to, or that may reasonably be anticipated to, prevent and/or discourage plover/tern nesting; and remove any such devices that have already been placed. This does not include the placement of single pin flags to mark nest locations.
- Cease and not resume the practice of "scuffing out" potential plover nesting scrapes.
- Cease beach grooming activities between now and the end of September.
- Cease grading/operation of heavy equipment south of MP 3 until the end of September, other than in cases of emergency as determined by the Executive Director.
- Limit the use of vehicles in the Park by State Park staff to the extent practicable.
- Any other unpermitted activities identified in our June 16, 2020 violation letter that you would agree to voluntarily cease performing.

We appreciate your anticipated cooperation and look forward to working with you in the future to address the critical resource protection issues at OSDVRA and moving towards addressing activities in a legal context, such as a CDP, CDPA or PWP, that can assist all parties going forward.

Thank you.



JOHN AINSWORTH
Executive Director

cc: Mark Gold, Director, Ocean Protection Council
Dan Canfield, California State Parks Acting OHV Deputy Director
Jim Newland, California State Parks PWP Manager
Kevin Pearce, California State Parks Acting Oceano Dunes Superintendent
Ronnie Glick, Senior Environmental Scientist, State Parks Oceano Dunes District
Paul Souza, United States Fish and Wildlife Service Region 8 Director
Lena Chang, United States Fish and Wildlife Service Senior Fish & Wildlife Biologist
Julie Vance, California Department of Fish and Wildlife Regional Manager
Bob Stafford, California Department of Fish and Wildlife Program Manager